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APR 4 - 2005

No. 04-1178

In The

Supreme Court of the United States

PETER HOUSTON,

Petitioner,

v.

ARAMARK CORPORATION, 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION, ARAMARK OWNERSHIP PROGRAM AND ARAMARK BENEFIT PLAN ADMINISTRATOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether this Court should deny the writ of certiorari where the Third Circuit Court of Appeals, consistent with the decision of every Circuit Court of Appeals to consider the issue and with the Department of Labor's articulated analytical framework, correctly concluded that the stock option incentive plans in this action were not "employee pension benefit plans" subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461?

SUPREME COURT RULE 29.6 STATEMENT

Respondent ARAMARK Corporation makes the following disclosures:

1) ARAMARK Corporation has no parent corporation.

2) No publicly held companies hold 10% or more of ARAMARK Corporation's stock.

3) No publicly held companies that are not a party to the proceeding before this Court have a financial interest in the outcome of the proceeding.

Respondents 1984 Stock Option Plan of the ARAMARK Corporation, ARAMARK Ownership Program, and ARAMARK Benefit Plan Administrator are not corporate entities.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, ARAMARK Corporation, 1984 Stock Option Plan of the ARAMARK Corporation, ARAMARK Ownership Program, and ARAMARK Benefit Plan Administrator, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit Court of Appeals' unpublished opinion in this case.

COUNTER-STATEMENT OF THE CASE

On June 1, 2001, Petitioner Peter Houston voluntarily retired from his employment with Respondent ARAMARK Corporation ("ARAMARK" or the "Company"). ARAMARK awarded certain employees, including Petitioner, stock options under the 1984 Stock Option Plan of the ARAMARK Corporation (the "1984 Plan") and the Installment Stock Purchase Opportunities of the ARAMARK Ownership Program (the "Ownership Program"; and together with the 1984 Plan, the "Plans"). The options gave these employees, including Petitioner, the right to purchase a set number of shares of ARAMARK stock at a set price as provided for in the Plans. Exercising his options under the Plans over a period of time, Petitioner purchased a total of 120,849 shares of ARAMARK common stock.[1] As a condition of purchase, Petitioner adopted the Amended and Restated Stockholders' Agreement of ARAMARK Corporation (the "Stockholders' Agreement").

[1] During his employment, Petitioner sold 3,247 shares, leaving him with 117,602 shares of ARAMARK common stock at the time of his retirement.

The Stockholders' Agreement governed every aspect of Petitioner's ownership of ARAMARK stock. Relevant to this action, the Stockholders' Agreement granted ARAMARK the right to repurchase Petitioner's shares upon the termination of his employment at the then-current Appraisal Price.[2] Additionally, the Stockholders' Agreement explicitly limited ARAMARK's duty to disclose pending or proposed transactions that could affect the Appraisal Price and repurchase price of Petitioner's shares.

Petitioner's voluntary retirement triggered the Company's buy-back right. At the time he retired, Petitioner knew that ARAMARK had previously indicated that a public offering of its shares was a possibility.[3] Moreover, before Petitioner retired, ARAMARK's Benefits Director, Robert Bevilacqua, suggested to Petitioner that he wait a year before retiring to see if a public offering occurred.

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[2] The Stockholders' Agreement defines Appraisal Price as "the fair market value of [Common Stock], as determined by an Appraiser according to the most recent existing appraisal of shares of Common Stock, which appraisal shall be as of a date not more than six months prior to the use thereof" and states that "[the] determination by the Appraiser shall be conclusive and binding on all Stockholders and ARAMARK." Moreover, the "Appraiser" is independent of ARAMARK, and is defined as a firm headquartered in the United States with recognized national standing in the business of valuation of securities.

[3] Petitioner incorrectly contends that ARAMARK's top management "knew that it was about to announce an initial public offering (IPO) of its stock that would result in a substantial increase in the value of [Petitioner's] shares" and that "[Petitioner] did not have this information." (Pet. at 3.) Petitioner does not plead in his Amended Complaint that ARAMARK's management knew that the Company was about to announce an IPO at the time Petitioner retired. Moreover, at the time of his retirement, Petitioner knew that ARAMARK had previously indicated that an IPO was a possibility.

Petitioner rejected Mr. Bevilacqua's specific advice to wait a year before retiring to see if an IPO occurred.

Upon Petitioner's retirement, ARAMARK exercised its buy-back right, calling Petitioner's shares on June 14, 2001 at the Appraisal Price of $20.80 per share (for a total purchase price of $2,446,121.60).[4]

On July 17, 2001, ARAMARK announced a proposed IPO of Company stock, which did not occur until December 2001. At the time of closing of the IPO in December 2001, the stock traded at $46 per share.[5] Because Petitioner had retired effective June 1, 2001, and because he had sold to ARAMARK all of his shares under the precise terms of a Repurchase Agreement, he owned no shares as of the time of the IPO. Nearly two years later, obviously disappointed in his own voluntary decision to retire, Petitioner filed his Complaint in District Court, alleging that ARAMARK denied him benefits under the Plans and breached its common law and ERISA fiduciary duties by failing (allegedly) to disclose the impending IPO of ARAMARK stock.

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[4] Petitioner incorrectly contends that ARAMARK "declined to apply the retroactive market cancellation date to its purchase of [Petitioner's] shares on grounds that he had signed a release" and that "he received no consideration for the release." (Pet. at 4 n.1.) Petitioner did execute a Release, which serves as a bar to all of his claims. However, irrespective of the Release, ARAMARK had no legal duty to purchase Petitioner's shares at the post-IPO share price. Moreover, contrary to Petitioner's contention that he received no consideration for the Release, the District Court specifically upheld the validity of the Release and held that it barred Petitioner's state law claims. (Pet'r App. at 13a.) Petitioner's suggestion that the Release is invalid for lack of consideration should be disregarded.

[5] Petitioner incorrectly contends that the stock price increased to $46 per share immediately upon ARAMARK's announcement of the proposed IPO on July 17, 2001. (Pet. at 3.)

ARAMARK moved to dismiss Petitioner's claims on three independent grounds, contending that: (1) the stock option plans on which Petitioner based his ERISA claims were not "employee benefit plans" within the meaning of ERISA, and thus ERISA did not govern claims for benefits under those plans; (2) Petitioner had executed a broad Release of all of his claims in exchange for accelerated payment of his stock value; and (3) Petitioner unequivocally waived any right he may have allegedly had to receive information relating to ARAMARK's consideration of a potential IPO prior to his retirement, and thus his breach of fiduciary duty claims failed as a matter of law. On December 15, 2003, the United States District Court for the Eastern District of Pennsylvania dismissed all of Petitioner's claims with prejudice, on all three independent grounds. (Pet'r App. at 13a.)

Petitioner appealed the decision to the Third Circuit Court of Appeals, which rendered its ruling on October 1, 2004. The Third Circuit Court of Appeals affirmed the District Court's holding that the Plans are not ERISA benefit plans and that Petitioner failed to state a claim for breach of fiduciary duty under state law because he waived his right to receive information about future corporate events, including an IPO.[6] (Pet'r App. at 8a-9a.)

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[6] The precedential value of the Third Circuit Court of Appeals' decision in this case is severely limited by the fact that it is an unpublished disposition and prominently states at the top of the decision that it is "NOT PRECEDENTIAL." *See Houston v. ARAMARK Corp.*, No. 04-1103, 112 Fed. Appx. 132, 2004 WL 2203981 (3d Cir. Oct. 1, 2004) (emphasis in original). The copy of the decision appended to Petitioner's brief conveniently leaves out the "NOT PRECEDENTIAL" notation that is included on the original opinion and every other copy of the decision.

The Third Circuit Court of Appeals denied Petitioner's Petition for Rehearing En Banc and for Panel Rehearing, Pursuant to Rules 35(b) and 40(a)(2), Fed. R. App. P., on November 22, 2004. (Pet'r App. at 15a.)

REASONS FOR DENYING THE WRIT

In its decision below, the Third Circuit Court of Appeals, consistent with the opinion of every Circuit Court of Appeals to consider the issue, held that the stock option incentive plans in this case do not constitute ERISA pension plans.[7] Contrary to Petitioner's contention, the Department of Labor Advisory Opinions do not support his argument, nor do they conflict with the position of the Third Circuit Court of Appeals. Moreover, the plain language of the statute, combined with regulations promulgated by the Department of Labor, leaves no doubt that the position of the Third Circuit Court of Appeals is correct. Because the Third Circuit Court of Appeals correctly resolved the issues before it, there are no special or important reasons for granting review of this matter, as required by Rule 10 of this Court's Rules.

[7] As discussed more fully below, Section 3(2)(A) of ERISA defines an "employee pension benefit plan" as a plan that "by its express terms or as a result of surrounding circumstances . . . provides retirement income to employees, or . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A)(i)-(ii).

I. The Department Of Labor Advisory Opinions Do Not Support Petitioner's Claim That The Plans Constitute ERISA Plans And Petitioner's Attempt To Suggest Otherwise Is Wholly Contrived.

Petitioner represents to this Court that there is "an applicable DOL Advisory Opinion which expressed the Department's position on ERISA coverage for the precise substantive issue involved in this case" and that the Third Circuit Court of Appeals erred in failing to acknowledge the Advisory Opinion. (Pet. at 6.) Neither of the Advisory Opinions Petitioner relies on support his argument, nor do the Advisory Opinions conflict with the position of the Third Circuit Court of Appeals in this case. Indeed, in both of the Advisory Opinions cited by Petitioner, the Department of Labor opined that the plans at issue were **not** ERISA pension plans under the "express terms" test. Adv. Op. 98-02A, 1998 WL 103654 (Dep't of Labor, Mar. 6, 1998); Adv. Op. 90-17A, 1990 WL 263441 (Dep't of Labor, Oct. 25, 1990). Moreover, the Department of Labor explicitly refused to opine on whether a plan constituted an ERISA pension plan under the "surrounding circumstances" test:

> The question of whether a plan, find [sic], or program is a pension plan as a result of surrounding circumstances is inherently factual in nature, and generally the Department does not issue advisory opinions on such questions.

Adv. Op. 98-02A, 1998 WL 103654, at *2. *See also* Adv. Op. 2002-13A, Pens. Plan Guide (CCH) P 19,989H, 2002 WL 31846478 (Dep't of Labor, Dec. 6, 2002) (same); Adv. Op. 90-17A, 1990 WL 263441 (refusing to opine on whether a stock option plan constitutes an ERISA pension plan

under the surrounding circumstances test due to the inherently factual nature of the determination).

Incredibly, relying on the same Advisory Opinions he cites to this Court, Petitioner previously admitted in the District Court that "[b]ecause of the fact-sensitive nature of the 'surrounding circumstances' test, the Department of Labor refuses to issue advisory opinions as to whether a particular stock option or bonus program should be considered an ERISA pension plan." (Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss the Amended Compl. at 13.) Having previously conceded that the Department of Labor refused to opine on whether a stock option plan is an ERISA pension plan, which is the dispositive issue in this case, Petitioner's contention that the Third Circuit Court of Appeals erred in overlooking "applicable" Department of Labor Advisory Opinions is specious at best.

Moreover, consistent with the analysis employed by the Department of Labor in its Advisory Opinions,[8] the Third Circuit Court of Appeals devoted over two full pages of its opinion to whether the circumstances surrounding the Plans in this case rendered the Plans ERISA pension plans, and correctly decided that the circumstances did not warrant such a conclusion. (Pet'r App. at 6a-8a; *see also infra* Section II.) There being no Department of Labor Advisory Opinions that conflict with the Third Circuit

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[8] In its Advisory Opinions, the Department of Labor explained that a plan may be an ERISA pension plan as a result of surrounding circumstances, "if payments under a plan are, in operation, systematically deferred until the termination of employment or retirement age." Adv. Op. 98-02A, 1998 WL 103654, at *3; *see also* Adv. Op. 90-17A, 1990 WL 263441.

Court of Appeals' conclusion, the Court should deny the Petition.[9]

II. The Third Circuit Court Of Appeals Fully Considered The Issues And Correctly Decided That The Plans Are Not ERISA Pension Plans, Consistent With The Opinion Of Every Circuit Court Of Appeals To Consider The Issue.

In the decision below, the Third Circuit Court of Appeals, consistent with the opinion of every Circuit Court of Appeals to consider the issue, correctly concluded that the Plans do not constitute pension benefit plans under ERISA. (*See* Pet'r App. at 7a-8a.)

ERISA defines an "employee pension benefit plan" as a plan that "by its express terms or as a result of

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[9] Petitioner's contention that the Third Circuit Court of Appeals ignored "a Supreme Court case which directs that an applicable Department of Labor Advisory Opinion merits the Judiciary's 'respectful consideration'" is a red herring. First, as explained above, the Department of Labor Advisory Opinions do not support Petitioner's position. Second, Petitioner overstates the deference owed to Department of Labor Advisory Opinions. In *Christensen v. Harris County*, 529 U.S. 576, 586-88 (2000), the Court specifically addressed the level of deference owed to a Department of Labor Advisory Opinion. After careful analysis, the Court held that opinion letters are "'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Id.* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The Court rejected the contention that Advisory Opinions should be afforded the same heightened deference owed to agency regulations under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In this case, the Advisory Opinions on which Petitioner relies lack any persuasive power as the Department of Labor specifically declined to opine on the issue at hand, *i.e.*, whether a stock option incentive plan constitutes an employee benefit plan under ERISA.

surrounding circumstances . . . (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A)(i)-(ii).

Petitioner does not dispute the Third Circuit Court of Appeals' holding that "[b]y their express terms the plans were designed to align key employees' interests with those of Aramark [sic] by giving the plans' participants a stake in the company." (Pet'r App. at 6a; Pet. at 2.) Rather, the gravamen of Petitioner's claim is that "under the 'surrounding circumstances' here involved, the stock option plan can be viewed as an ERISA plan." (Pet. at 2.) Petitioner contends that because he "intended to fund his retirement with stock proceeds, and because the plans resulted in a deferral of a portion of his income to his retirement and beyond, the plans meet ERISA's definition of 'employee pension benefit plan.'" (Pet'r App. at 7a.)

The Third Circuit Court of Appeals rejected Petitioner's contention. (*Id.*) The Third Circuit Court of Appeals aptly observed that "[a]ny outright conveyance of property to an employee might result in some payment to him after retirement." (*Id.*, quoting *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575 (5th Cir. 1980).) *See also Oatway v. Am. Int'l Group, Inc.*, 325 F.3d 184, 188 (3d Cir. 2003) ("[T]he mere fact that some payments under a plan may be made after an employee has retired or left the company does not result in ERISA coverage by statutory definition."); *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929, 933 (8th Cir. 1999) ("[T]hough the [plan's] vesting requirement could result in the deferral of a portion of any earned incentive until a participant's termination or retirement . . . such a deferral would only occur by

happenstance."), *cert. denied*, 540 U.S. 947 (2003); *McKinsey v. Sentry Ins.*, 986 F.2d 401, 406 (10th Cir. 1993) (same).

The Third Circuit Court of Appeals further explained that "[t]he design of the plan at issue, not the individual participants' intended use of the proceeds, must be the perspective from which the definition of 'employee pension benefit plan' is determined." (Pet'r App. at 7a (internal citation omitted).) Here, as the Third Circuit Court of Appeals observed, the Plans served as reward and incentive programs, not as a tool for systematically deferring income past termination of employment. (*See* Pet'r App. at 8a.) The 1984 Plan explicitly states that:

> ARA Performance Stock Options are designed to enable key ARA management to purchase shares of ARA Holding Company stock on terms that will give them a direct, sustained, and long-term interest in ARA's success.

Likewise, the Ownership Program states that its purpose is:

> to enable ARAMARK Corporation . . . to continue to compete successfully in attracting and retaining key employees by making it possible for them to purchase shares of the Company's Common Stock on terms which will give them a more direct and continuing interest in the future success of the Company's business.

The Ownership Program provides further that "[i]ndividual grants are generally made in connection with hires, promotions, and other forms of recognition of performance." Thus, as the Third Circuit Court of Appeals properly concluded, ARAMARK intended for the Plans to provide an incentive

for "key employees" to remain with ARAMARK and to reward their performance, not to provide them with retirement income. (*See* Pet'r App. at 8a ("[T]he plans were designed to align key employees' interests with those of ARAMARK by giving the plans' participants a stake in the company.").) As such, the Plans do not meet the definition of an employee benefit plan under ERISA. (*See id.*) *See also Oatway*, 325 F.3d at 189 (holding that a stock option incentive plan was not subject to ERISA because it was "not created for the purpose of providing retirement income, but rather was an incentive plan designed to provide financial incentive for employees to remain with [the company] and improve their performance there"); *Emmenegger*, 197 F.3d at 932-33 (holding that phantom stock plan was not subject to ERISA where the stated purpose of the plan was to ensure continuity of management of the corporation and the plan "*relates awards to service* to the Corporations") (emphasis in original); *Murphy*, 611 F.2d at 575 (holding that ERISA governs only those plans that are "designed for the purpose of paying retirement income whether as a result of their express terms or surrounding circumstances").

The Third Circuit Court of Appeals also found support for its conclusion that the Plans were not subject to ERISA in the regulations promulgated by the Department of Labor to clarify the limits of the terms "employee pension benefit plan" and "pension plan." (Pet'r App. at 7a.) The Department of Labor's regulations specifically exclude from the definition "payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees." (Pet'r App.

at 7a, quoting 29 C.F.R. § 2510.3-2(c).) Noting that Petitioner sold over 3,000 shares prior to his retirement, the Third Circuit Court of Appeals concluded that the deferral was not systematic, notwithstanding Petitioner's election "not to sell most of his exercised stock options before Aramark [sic] called them upon his retirement." (Pet'r App. at 8a.)[10] Thus, the Third Circuit Court of Appeals correctly concluded that the Plans did not systematically defer payments to provide retirement income, and therefore did not satisfy the definition of an ERISA pension plan. (*Id.*) *Accord Emmenegger*, 197 F.3d at 933 (holding that phantom stock plan did not systematically defer benefits to provide retirement income where evidence showed that certain participants redeemed shares while still employed by the company); *McKinsey*, 986 F.2d at 406 (holding that plan that permitted employee to "defer payment . . . until the termination of employment or to provide retirement income" was not an ERISA-covered plan because plan permitted employee to withdraw allocations during the course of employment as well, and therefore did not provide for the "systematic deferral of payment"); *Murphy*, 611 F.2d at 575-76 (holding that

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[10] Petitioner's argument that the "put" provision in the Stockholders' Agreement, which under certain circumstances allows a stockholder to compel ARAMARK to purchase up to thirty percent of his shares upon death or retirement, converts it into an ERISA plan has no merit. As the District Court properly recognized:

> [T]he "put" provision may make it easier to sell ARAMARK shares following death or retirement, but it does not necessarily serve to increase the value of the shares, nor does it change the fact that retirement is not an absolute condition precedent to sale. A plan participant is free to sell the shares, with restrictions, before retiring.

(Pet'r App. at 12a.)

payments were not systematically deferred to the termination of covered employment or beyond or so as to provide retirement benefits where plan was "designed to provide current rather than retirement income" to employees, notwithstanding that some of the proceeds "might be paid to an employee after he had retired or otherwise left [the company]").

Five Circuit Courts of Appeals (including the Third Circuit Court of Appeals) have uniformly and categorically rejected claims similar to Petitioner's contention that stock option incentive plans or other similar arrangements are ERISA pension plans where the plans were not designed to provide retirement income or systematically defer payments until termination of employment. *See Oatway*, 325 F.3d at 189 (holding that a stock option incentive plan was not an employee benefit plan under ERISA); *Estate of McLoone v. Intel Corp.*, No. 99-35559, 2001 WL 32067, at *1 (9th Cir. Jan. 12, 2001) (unreported) (holding that stock option agreements were not employee benefit plans under ERISA); *Emmenegger*, 197 F.3d at 933 (holding that phantom stock plan was not an ERISA pension plan); *McKinsey*, 986 F.2d at 405-06 (holding that bonus plan was not an ERISA pension plan because it did not provide for the systematic deferral of payment); *Murphy*, 611 F.2d at 574-76 (holding that stock option incentive plans were not employee benefit plans under ERISA). No federal appellate court has held to the contrary. Accordingly, there is no compelling reason for the Court to expend its valuable but very limited resources to address Petitioner's claim.

In sum, the Third Circuit Court of Appeals correctly held that the Plans are not ERISA pension plans. Accordingly, this Court should deny the petition for writ of certiorari.

III. The Court Should Deny The Petition Because Petitioner Released His Claims.

Even assuming *arguendo* that ERISA governs the Plans, Petitioner executed a Release that bars his claims. In consideration for receiving accelerated payments for his shares, Petitioner released Respondents from:

> any and all manner of actions, suits, proceedings, claims and demands of any kind or character whatsoever, at law or in equity, in any way directly or indirectly related to or connected with all purchase opportunities and options, if any, and in connection with the issuance, purchase and repurchase of the Shares, including, but not limited to claims relating to . . . any and all suits in tort or breach of contract, as well as any and all claims for additional compensation or damages, except for ARAMARK's obligation set forth in Section 8.02 of the Stockholders' Agreement, and except for the obligations set forth in the Note. You agree that you will not file a lawsuit to assert any such claim.

(Compl. Ex. D at 35.) Petitioner claims that he is entitled to "a recalculation of the price of his repurchased shares at $46.00 per share" and that he is entitled to "restitution of [his] ARAMARK stock shares . . . so that they are subject to repurchase by ARAMARK at the price of $46.00 per share." Thus, Petitioner seeks "additional compensation or damages" "related to or connected with . . . the issuance, purchase and repurchase of the Shares." As demonstrated below, the Release bars Petitioner's claims, warranting dismissal of his purported ERISA claims.

It is well settled that a benefit plan participant may release an ERISA claim by entering into the release

voluntarily and with knowledge of its terms. *See Lawson v. Consol. Rail Corp.*, No. Civ. A. 97-7206, 1999 WL 171431, at *3 (E.D. Pa. Mar. 29, 1999); *Feret v. First Union Corp.*, No. Civ. A. 97-6759, 1999 WL 80374, at *5 (E.D. Pa. Jan. 25, 1999); *Bennett v. Independence Blue Cross*, No. Civ. A. 92-4249, 1993 WL 15603, at *2 (E.D. Pa. Jan. 13, 1993). To determine whether a participant knowingly and voluntarily released his claims, courts apply a "totality of the circumstances" test, which incorporates the following seven factors: (1) the clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time the plaintiff had for deliberation before signing the release; (4) whether the plaintiff knew or should have known his rights upon execution of the release; (5) whether the plaintiff was given the opportunity to consult with an attorney before signing the release; (6) whether there was an opportunity for negotiation of the terms of the agreement; and (7) whether the plaintiff received adequate consideration for the release. *Lawson*, 1999 WL 171431, at *3; *Feret*, 1999 WL 80374, at *5. *See also Leavitt v. Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990).

Petitioner's execution of the Release satisfies each element of the totality of the circumstances test. First, the language of the Release clearly and unambiguously discharges *any claim* relating to the "issuance, purchase and repurchase" of Petitioner's shares of ARAMARK stock. *Cf. Bennett*, 1993 WL 15603, at *2 (holding that a release of "any and all claims . . . arising out of my employment and termination therefrom" was clear and specific). Second, Petitioner is an attorney, and his depth of business experience and his legal education clearly satisfy the "minimal threshold" of the totality of the circumstances

test. *Id.* (a high school diploma and twenty years of experience as a computer programmer satisfied education and experience factor). *See also Leavitt*, 921 F.2d at 163 (experience as a management employee satisfied test).

Third, the Release specifically provided Petitioner with twenty-one days to consider its terms, and specifically advised Petitioner that by executing the Repurchase Agreement within the allotted period, "you agree that your decision to do so was knowingly and voluntarily made." (Compl. Ex. D.)[11] Courts have held that shorter periods of time satisfy the knowing and voluntary test. *See, e.g.*, *Leavitt*, 921 F.2d at 163 (eleven days sufficient); *Bennett*, 1993 WL 15603, at *3 (eight days was "ample" time to deliberate). Fourth, the Release specifically advised Petitioner that he would be releasing Respondents from "any and all manner of actions, suits, proceedings, claims and demands of any kind whatsoever . . . in any way . . . connected with the issuance, purchase and repurchase" of his shares. (Compl. Ex. D at 35.) At the time he signed the Release, Petitioner knew that he could miss out on the benefits of a subsequent public offering. (*See* Compl. ¶ 13.) Indeed, he candidly admits in the Amended Complaint both that he discussed with Mr. Bevilacqua that an IPO was a real possibility, and that Mr. Bevilacqua advised him to wait one year to retire just in case there was an IPO in that year. (*Id.*) Rejecting this advice, and with full knowledge of his rights, Petitioner chose to receive more

[11] The Release further granted Petitioner an additional seven-day window following his execution of the Repurchase Agreement to revoke the Release. (*See* Compl. ¶ 18, Ex. D at 35 ("You also have the right for a period of seven days following your execution of this Repurchase Agreement . . . to revoke this Repurchase Agreement.").)

money up front and accelerated payments in exchange for releasing Respondents from *any claims* relating to the "issuance, purchase and repurchase" of his shares.

Fifth, ARAMARK specifically encouraged Petitioner to consult with counsel before signing the Release and provided ample opportunity for him to do so: "[y]ou are encouraged to consult with your attorney prior to execution of this Repurchase Agreement." (Compl. Ex. D at 35.) *See Bennett*, 1993 WL 15603, at *3 (employer satisfied the opportunity to consult with counsel factor where the release stated that plaintiff had been given the opportunity to consult with counsel). *See also Leavitt*, 921 F.2d at 163 (opportunity to consult with counsel factor satisfied where the release advised plaintiff of his right to consult with an attorney, even though plaintiff chose not to do so). Sixth, Petitioner did not allege that he was denied an opportunity to negotiate the terms of the Release. *See Bennett*, 1993 WL 15603, at *3.

Finally, the consideration Petitioner received for executing the Release significantly exceeded that to which he was legally entitled. The Stockholders' Agreement entitled Petitioner to receive only ten percent of the total purchase price for his shares at closing with installment payments over a ten-year period. (*See* Compl. Ex. C § 6.01.) As consideration for executing the Release, Petitioner received rapidly accelerated payments: twenty-five percent at closing with installments paid over a three-year period. (Compl. ¶ 18, Ex. D at 2.) Petitioner's receipt of accelerated payments for his shares constitutes adequate consideration for the Release. Having satisfied all seven elements of the totality of the circumstances test, it is irrefutable that Petitioner knowingly and voluntarily released Respondents from any ERISA claims he may

have. Accordingly, even if the Plans were subject to ERISA, the Release bars Petitioner's claims.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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